Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States October Term, 1991

CHARLES HANSEN,

Respondent

vs.

GERALD R. BENNETT, Individually and as Mayor of Palos Hills, and DANIEL HURLEY, Individually and as then former Police Chief of Palos Hills,

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Mayor of a local municipality who presides over a city council meeting have absolute immunity from liability under 42 U.S.C. 1983 for ordering the removal of a disruptive individual from the council meeting?

2. Does the Chief of Police of a local municipality who is present at a city council meeting in his capacity as sergeant-at-arms have absolute immunity from liability under 42 U.S.C. 1983 for effecting the facially valid order of the Mayor to remove a disruptive individual from the council meeting?

[Note: Petitioners reserve the right to argue Question 3 in the event certiorari is granted on one or both of the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Did the Court of Appeals for the Seventh Circuit improperly conclude it did not have jurisdiction to review the U.S. District Court's denial of the petitioners' motion for partial summary judgment based upon a qualified immunity from liability under 42 U.S.C. 1983 for removing a disruptive individual from a city council meeting?

LIST OF PARTIES

The parties to the proceedings below are the petitioners, the Honorable Gerald R. Bennett, Mayor of Palos Hills, Illinois, a municipal corporation, and Daniel Hurley, the former Chief of Police of the Palos Hills Police Department.

The respondent before this Court is Charles Hansen, a citizen of Palos Hills, Illinois.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. The Seventh Circuit's decision that absolute immunity does not extend to the Mayor of a local municipality who presides over a City Council meeting and orders a disruptive individual to be removed from the meeting is in conflict with this Court and other circuits 6

II. The Seventh Circuit's decision that absolute immunity does not extend to the Chief of Police of a local municipality who, in his capacity as sergeant-at-arms, enforces a facially valid order of the Mayor to remove a disruptive individual from a City Council meeting is in conflict with this Court and other circuits 14

CONCLUSION 16

APPENDIX (opinion and Judgment of Court of Appeals and Memorandum Decisions of District Court) 17

TABLE OF AUTHORITIES

Cases: *Page*

Aitchison v. Raffiani, 708 F.2d 96 (3rd Cir. 1983) 7

Browning v. Clerk, U.S. House of Representatives, 789 F. 2d 923 (D.C. Cir. 1986) 14

Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980) 7

Collinson v. Gott, 895 F.2d 994 (4th Cir. 1990) 10-11, 13

Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982) *cert.denied*, 460 U.S. 1039, 103 S. Ct. 1431, 75 L.Ed.2d 791 7

Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed. 2d 555 (1988) 6-7, 10, 12

Gorman Towers, Inc. v. Boboslavsky, 626 F.2d 607 (8th Cir. 1980) 7

Gravel v. U.S., 408 U.S. 606 10

Green v. DeCamp, 612 F.2d 368, 371 (8th Cir. 1980) 14

Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1991) 1, 6, 9-10, 15

Henry v. Farmer City Bank, 808 F. 2d 1228 (7th Cir. 1986) 14

Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) *cert.denied*, 455 U.S. 907 7

Imbler v. Pahtman, 424 U.S. 409 (1976) 7, 8

Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) 7

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed. 2d 401 (1979) 7

Latino Policitical Action Committee, Inc. v. City of Boston, 581 F. Supp. 478 (D.C. Mass. 1984) 7

Mireles v. Waco, ___ *U.S.*___, 60 U.S.L.W. 3307 (1991) 7, 13

Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F. 2d 642, 649 (10th Cir. 1988) 15-16

Page

Rateree v. Rockett, 852 F. 2d 946 (7th Cir. 1988) 7

Reed v. Village of Shorewood, 704 F. 2d 943, (7th Cir. 1983) 7

Schultz v. Sundberg, 759 F. 2d 714 (9th Cir. 1985) 12-13

Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 2d 1019 (1951) 7-8, 10, 12

Valdez v. City and County of Denver, 878 F. 2d 1285 (10th Cir. 1989) 12, 14

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 2

Ill.Rev.Stat., Chap. 24, Article 2 7

Ill.Rev.Stat., Chap. 24, § 3-11-9, § 3-11-14 8

Ill.Rev.Stat., Chap. 24, § 1-1-2, § 1-2-1 8

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CHARLES HANSEN,

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Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR THE SEVENTH CIRCUIT

The petitioners Gerald R. Bennett and Daniel Hurley respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on November 27, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 948 F.2d 397 and is reproduced in the appendix hereto, p. 1a, *infra*.

The memorandum decisions of the United States District Court for the Northern District of Illinois, Eastern Division (Williams. A. J.) have not been reported. They are reproduced in the appendix hereto, p. 15a-25a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42. U.S.C. 1983, the respondent brought this suit in the United States District Court for the Northern District of Illinois, Eastern Division. On October 22, 1990, the District Court denied the Petitioners' Motion for partial summary judgment which was based on absolute and qualified immunity. On November 21, 1990, the court granted the petitioners' motion for reconsideration but again denied the petitioners' motion for partial summary judgment based on absolute and qualified immunity.

On petitioners' appeal, the Seventh Circuit Court of Appeals, on November 27, 1991, entered a judgment and opinion affirming the District Court's denial of both petitioners' motion for partial summary judgment on the ground of absolute immunity, and dismissed for want of jurisdiction that portion of the petitioners' appeal relating to the District Court's denial of both petitioners' motion for partial summary judgment on the ground of qualified immunity. The court ruled it had no jurisdiction over the qualified immunity question because a disputed factual issue existed regarding Mayor Bennett's intent.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Respondent has been active in issues involving the Palos Hills community for approximately the past 11 years. Petitioner Bennett (hereinafter "Mayor" or "Bennett") dislikes the respondent's activities with respect to some issues regarding the City of Palos Hills. Bennett has described the respondent as annoying during council meetings because of respondent's continuing outbursts and interruptions of others who were speaking.

On November 5, 1987, a meeting of the City Council of the City of Palos Hills convened at 8:00 p.m. Present at the meeting were Mayor Bennett, all elected alderpersons, other City officials including Petitioner Hurley (hereinafter "Chief" or "Hurley"), and members of the public.

While the November 5, 1987 Council meeting was a regularly scheduled and valid meeting of the Palos Hills City Council, this meeting was special in the sense it was "Turnabout Day." Turnabout Day involved the attendance of high school students (hereinafter "youth") at the Council meeting who acted as mayor, alderpersons, and various city officials, thus affording the youth the opportunity to act as the governing body of Palos Hills and to observe city business in action. The actual voting of the Council was done by the elected officials and not the youth. The agenda for the meeting was intended to involve the youth in city business and procedures and took several hours to complete. These youth had been chosen prior to November 5, 1987, and, on Turnabout Day, were with the particular City official with whom they shared an official title for the entire day.

Prior to November 5, 1987, the respondent had spoken on 30 or more occasions before the City Council on the issue of Stoney Creek Park East and West. The respondent was of the opinion toxic materials existed in the ground of the proposed Stoney Creek ParkWest and was opposed to the construction of the park until this issue was resolved to his satisfaction.

Prior to November 5, 1987, the respondent encouraged numerous citizens, representatives of government agencies, and media members to attend the Council meeting notwithstanding the fact the respondent knew the issue of Stoney Creek Park West was not on the agenda for Turnabout Day. Since the issue of Stoney Creek Park West was not on the agenda, the issue could only be discussed during the citizen's petition or citizen hearing portions of the Council meeting. On 11/4/87 the respondent submitted to the city clerk a written request to speak at the citizen's petition portion of the meeting.

On November 5, 1987 the Council chamber was filled to capacity (approximately 125 persons sitting in chairs, standing in the aisles and standing along the walls) due to the presence of the parents, relatives and friends who attended to see the young adults participating in Turnabout Day. Other individuals also attended the meeting because the issue of Stoney Creek Park West was going to be raised by respondent.

The Palos Hills Council meetings are tape recorded as a matter of course. The record includes a true and accurate copy of the tape recording of the November 5, 1987 meeting and a transcription of the relevant portions of the tape.

The respondent's name was called at the citizen's petition portion of the meeting and he was advised he had three minutes to speak. The respondent spoke for a period of time and then requested additional time to speak. That request was denied by the Council. The Mayor cast a tie-breaking nay vote and said he did so because the issue of Stoney Creek Park West had been before the City Council on several occasions during the last three months. Also, it was Turnabout Night, a meeting set aside for the Youth of the community, and thus it was an inappropriate time to discuss the issue of Stoney Creek Park West at length.

Thereafter, the respondent spoke and continued to ask for additional time. The Mayor at one point asked the respondent to sum up his talk and later told the respondent his time was up. The tape reveals a part of the audience reacted when the Mayor told the respondent his time was up. The audience reacted in this manner because the respondent had told them the issue would be discussed at the meeting. A lengthy discourse occurred among persons present in the room which included the Mayor and the respondent. Twice during this time, the Mayor told the respondent he was "out of order."

The Youth Mayor announced the commencement of the citizen hearing portion of the meeting at which time several citizens spoke on the Stoney Creek Park West issue. During this time, the respondent continued to speak without being recognized by the chair. He also continually waived his arms back and forth in the air seeking to be recognized and was perturbed he was not acknowledged. The Mayor responded to other speakers who had been recognized.

The Mayor warned the respondent to cease his conduct or he would be removed. When he did not stop, the Mayor ordered his removal from the council chamber by telling the Chief to

remove the respondent. The Chief escorted the respondent out of the council chamber pursuant to the Mayor's order.[1]

According to the Mayor, he ordered respondent removed from the council chamber because Hansen was disrupting the meeting by: (1) speaking without being recognized, (2) interrupting other speakers, (3) urging other individuals present to disrupt the meeting, and (4) creating a serious tension in the council chambers which endangered the personal safety of the persons present. The respondent claims the Mayor removed him to suppress the content of his speech.

Both the District Court (p. 17a, *infra.*) and the Seventh Circuit (948 F.2d at 400) found the respondent had engaged in behavior which disrupted and delayed the meeting.

A person who speaks during the citizen's petition portion of the Council meeting may also be permitted to speak, if he is recognized by the chair, during the citizen hearing portion of the meeting. However, it is the custom of the Council to recognize those persons who have not yet spoken prior to recognizing an individual who has already spoken during the citizen's petition portion of the meeting.

After the respondent was removed from the chamber, the following legislative business was conducted:

1. Numerous reports from city officers, committee members and alderpersons were made on a number of legislative matters;

2. Upon vote of the alderpersons, the following was accomplished:

   a. A crossing guard was appointed;

   b. A resolution was passed authorizing the Mayor to sign an agreement with the Illinois Department of Transportation for the widening of Kean Avenue South;

   c. The warrant of the Finance Committee containing the city expenditures was approved by the City Council;

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[1] The respondent claims in his complaint that after he was removed from the council chambers he was beaten by police officers. The defendants deny the allegations. The petitioners partial motion for summary judgment only involves the respondent's § 1983 claim that he was wrongfully removed from the council meeting.

d. Numerous requests for hearings before the Plan Commission to change zoning and to change permitted use of realty were granted;

e. Ordinance No. 970 requiring all buildings in Palos Hills to contain signs noting the presence of a fire suppression system was passed and became law.

Within 30 days after the November 5, 1987 meeting, a special meeting was held regarding Stoney Creek Park West. Some time thereafter, the respondent did in fact address the Palos Hills City Council with respect to Stoney Creek Park West.

The City of Palos Hills is a municipal corporation established under the laws of Illinois and has adopted the mayoral form of government. Chief Hurley was present at the November 5, 1987 Council meeting in his capacity as Chief of Police and as sergeant-at-arms of the Council meeting. When Mayor Bennett ordered the removal of the respondent from the council chambers, Chief Hurley, in his capacity as sergeant-at-arms, was charged with the duty of enforcing that order.

The Seventh Circuit ruled that neither the Mayor nor Hurley were entitled to an absolute immunity for removing the respondent from the Council meeting. 948 F.2d at 404.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit's decision that absolute immunity does not extend to the mayor of a local municipality who presides over a city council meeting and orders a disruptive individual to be removed from the meeting is in conflict with this Court and other Circuits.

Absolute immunity from civil damages has evolved from a judicial policy judgment that the threat of litigation and money damages carries such potential for inhibiting public officials in the performance of certain duties that they should be free of that fear, even at the expense of injured parties. *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). The public interest in the unbridled functioning of government

processes, [e.g. judicial process, (*Forrester v. White,* 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed. 2d 555 (1988)), prosecutorial process (*Imbler v. Pahtman,* 424 U.S. 409, 430 (1976), legislative process, *Tenney v. Brandhove,* 341 U.S. 367, 376-77, 71 S.Ct. 783, 788, 95 L.Ed. 2d 1019 (1951)], far outweighs the benefit to be gained by providing an individual respondent a remedy for his or her deprivation.

In *Tenney,* this Court stated unequivocally that state legislators are *absolutely immune* from lawsuits when acting in their legislative capacity. Legislators ". . . are absolutely immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." Tenney, 341 U.S. at 377. *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 405, 99 S.Ct. 1171, 59 L.Ed. 2d 401 (1979), expanded absolute immunity to include regional legislators acting in a legislative capacity.

The Seventh Circuit, in *Rateree v. Rockett,* 852 F. 2d 946 (7th Cir. 1988) and *Reed v. Village of Shorewood,* 704 F. 2d 943, 952-53, (7th Cir. 1983), has held that local legislators are absolutely immune for their legislative acts. Other circuits have also applied absolute legislative immunity to local legislators. *Latino Policitical Action Committee, Inc. v. City of Boston,* 581 F. Supp. 478, 482 (D.C. Mass. 1984); *Aitchison v. Raffiani,* 708 F.2d 96 (3rd Cir. 1983); *Bruce v. Riddle,* 631 F.2d 272 (4th Cir. 1980); *Hernandez v. City of Lafayette,* 643 F.2d 1188 (5th Cir. 1981) *cert. denied* 455 U.S. 907; *Gorman Towers, Inc. v. Boboslavsky,* 626 F.2d 607 (8th Cir.1980); *Kuzinich v. County of Santa Clara,* 689 F.2d 1345 (9th Cir. 1982); *Espanola Way Corp. v. Meyerson* 690 F.2d 827 (11th Cir.1982) *cert denied,* 460 U.S. 1039, 103 S.Ct. 1431, 75 L.Ed.2d 791.

This Court has said it is the *function* of the individual who seeks immunity from suit that determines whether immunity will apply or not. ". . .immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v White,* 484 U.S. 219, 108 S.Ct. 538, 544, 98 L.Ed. 2d 555. (emphasis in original). See also: *Mireles v. Waco,* ___ U.S.___, 60 U.S.L.W. 3307 (1991).

An analysis of Illinois law demonstrates the Mayor functioned as a legislator when he presided over the Palos Hills City Council on November 5, 1987. The City of Palos Hills is a municipal corporation adopting the mayoral form of government which includes a mayor and city council. *Ill.Rev.Stat.*, Chap. 24, Article 2. The city council is made up of the alderpersons and the mayor who presides over the meetings and votes in the event of a tie and when more than a simple majority vote is necessary. *Ill.Rev.Stat.*, Chap. 24, § 3-11-9, § 3-11-14. The mayor is a member of the city council which body is the legislative authority of the municipality. *Ill.Rev.Stat.*, Chap. 24, § 1-1-2, § 1-2-1.

In accordance with Illinois law as set out above, the mayor of a mayoral form of government presides over and is chair of the city council. The mayor functions as a legislator in this capacity. On November 5, 1987, Mayor Bennett was the mayor of Palos Hills and was functioning in his capacity as the chair of the Palos Hills legislature. Mayor Bennett was therefore a legislator during the Council meeting of November 5, 1987 and issued his order to remove the respondent in his capacity as a legislator. Accordingly, Mayor Bennett is entitled to absolute immunity *even if the order of removal deprived the respondent of some constitutionally protected right. Imbler,* 424 U.S. at 427, 96 S. Ct. at 993; *Tenney,* 341 U.S. at 377, 71 S. Ct. at 788.

The question posed by the Seventh Circuit in the case at bar was:

> "Bennett argues that he is entitled to absolute legislative immunity because he removed a disruptive person from a city council meeting so that the city's aldermen could proceed with the meeting and, ultimately, conduct legislative business. Bennett relies on the facts that he, as Mayor, had a legislative power to break any tie in a vote among the aldermen, and that the council conducted legislative business later in the meeting. At the same time, Bennett does not dispute the fact that this portion of the meeting was open to any citizen's comment on any topic. Palos Hills Ordinance 716, Ex.C; Statement of Uncontested Facts at 3-4. As a result, this meeting contained elements of a legislative session. *Taking these undisputed facts,*

> *we are presented with a questions of law: if a legislator acts to restore order to that portion of a city council meeting which is devoted to open comments from the general public, is that legislator entitled to legislative immunity?" Hansen,* 948 F.2d at 400. (emphasis added)

The Seventh Circuit answered its question by deciding that absolute immunity did not apply to the Mayor's removal order since it did not implicate legislative matters; that is, the removal occurred during the portion of the meeting where citizens could address the Council on any topic. The Seventh Circuit reasoned that if the removal occurred during the time the Council was conducting legislative business, absolute legislative immunity would apply, but since the removal occurred earlier, it involved the Mayor's discretion to govern public speech which discretion was better protected, in the opinion of the Seventh Circuit, by qualified immunity. *Hansen* 948 F. 2d at 404. The Seventh Circuit wrote:

> "This holding is consistent with the purposes of legislative immunity. The Supreme Court has admonished that when deciding claims of absolute immunity, we must concentrate on an official's function so as 'not to extend the scope of the protection further than its purposes require.' *Forrester,* 108 S.Ct. at 542. The purpose of legislative immunity is to 'protect the integrity of the legislative process by insuring the independence of individual legislators.' *Brewster,* 408 U.S. at 507, 92 S.Ct. at 2535. In this case, we cannot see how Bennett's independence as a legislator–his ability to vote and speak freely on legislative matters -- is implicated. What is implicated is Bennett's discretion to govern public speech. This exercise of discretion is better protected by qualified immunity."

The Seventh Circuit admitted that "The applicability of absolute immunity to enforcement of rules governing parliamentary procedure is an open question", *Hansen,* 948 F.2d at 400, but refused to apply legislative immunity because it equated "legislative function" with speaking about, investigating, or voting on legislation. *Hansen,* 948 F.2d at 403. This narrow

definition is not supported by logic and is in conflict with decisions of this Court as well as other circuits.

The petitioners acknowledge that legislative immunity does not have unlimited boundaries, and that ". . ., the Court has been careful not to extend the [legislative immunity] protection further than its purposes require." *Forrester,* 108 S.Ct. at 542. However, petitioners insist that when the Mayor ordered the removal of the disruptive respondent, he did so in his legislative capacity to ensure the continuation of the legislative process and thus is entitled to legislative immunity. This Court has stated that the purpose of legislative immunity is to: (1) allow legislators to engage in the uninhibited discharge of their legislative duties, *Tenney* 341 U.S. at 377, (2) protect "the deliberative and communicative processes" *Gravel v. U.S.,* 408 U.S. 606, 625, and (3) immunize a legislator for his conduct within the "sphere of legitimate legislative activity" *Tenney,* 341 U.S. at 376. These stated purposes unquestionably apply to the single discretionary act of removing a disruptive individual from a legislative meeting. *Mayor Bennett was engaged in a legislative function at the council meeting.* This is true because, "For the local official, legislative policy is determined in part through public meetings." *Collinson v. Gott,* 895 F.2d 994, 1008 (4th Cir. 1990)(concurring opinion, Wilkinson J.).

The legitimate necessity to silence or remove disruptive individuals from public meetings is not a rare or isolated happenstance. The Seventh Circuit's opinion in the instant case cites numerous examples. *Hansen,* 948 F.2d at 400, note 5. If absolute immunity is not afforded for the single discretionary act of removing an *admittedly* disruptive individual from a public legislative meeting, it will have a chilling affect on a presiding officer's ability to conduct legislative meetings attended by the public. *The Seventh Circuit's decision in this case has caused serious concern and confusion among the legislative leaders in the circuit.* Because of the Seventh Circuit's ruling, legislative chairmen will be forced to conduct endless meetings since certain speakers will threaten § 1983 lawsuits unless they are allowed to speak as long as the speaker deems appropriate. As the case at bar vividly illustrates, the existence of time limits does not afford a solution since § 1983 lawsuits are threatened and filed

over a dispute as to whether the speaker was allowed as much time as the rule allows, or was not permitted to speak as long as some other individual at the meeting.

A chairman must make his decision to remove or not to remove a disruptive person rapidly and under frenzied circumstances. If the Seventh Circuit's decision is allowed to stand, presiding officers will be disinclined to exercise discipline at public meetings because of their fear of a 1983 lawsuit, and the tremendous costs incurred to defend the case. As a result, a local government's ability to conduct business and afford a forum for spirited yet *orderly* debate will be stymied, and "the deliberative and communicative processes" of local legislators will be seriously hampered. Disagreement with a mayor's single discretionary act of removal must be voiced at the ballot box, and not "second-guessed" by a jury in a courtroom.

In *Collinson v. Gott,* 895 F.2d 995 (4th Cir. 1990), Gott, the President of the County Board of Commissioners, ordered a citizen removed from a meeting because the plaintiff did not address his remarks to the topic of reorganization of the county. The plaintiff was escorted out of the meeting hall by a deputy sheriff. The justices of the Court were divided and each authored a separate opinion. Two justices ruled the defendant Gott was entitled to summary judgment on the ground of immunity, Justice Phillips so holding on the basis of qualified immunity, and Justice Wilkinson on the basis of absolute immunity. Justice Wilkinson wrote:

> "My Brothers fail to contemplate the grave harm to local government and the great potential damage to public debate that will follow from this holding. Rather than exposing presiding officers at public meetings to the litigious ordeal that inheres in a determination of the appropriateness of qualified immunity, not to mention a possible trial on the merits, I would hold Gott entitled to absolute immunity from suit for this single discretionary act. My disagreement with my Brothers concerning the type of immunity a presiding officer should be afforded is far from academic. 'To officials at risk of being sued, the difference between absolute and qualified immunity is crucial. . . [T]his

> is not simply a matter of probability of an ultimately favorable verdict; it amounts to the difference between being able to obtain a dismissal at the outset of the case and having to go to trial with a substantial defense.' P. Shuck, *Suing Government* 89 (1983)" 895 F.2d at 1005.

In the case at bar, the order of removal was part and parcel of a legislative session. The order was given to allow the legislature to proceed in an orderly fashion with its council meeting as well as to ensure the safety of the citizens present. The order of removal involved the actual functioning of the Palos Hills legislature, and therefore went to the heart of the legislative process. In *Schultz v. Sundberg,* 759 F. 2d 714 (9th Cir. 1985), the Court found the President of the Alaska Senate absolutely immune for ordering the Senate sergeant-at-arms and Alaskan state troopers to go to the office of an Alaskan representative and bring him to the Senate chambers by force. The Court said the Alaska Constitution's speech and debate clause (Illinois' counterpart is found at Illinois Constitution, Article IV, Section 12) immunizes legislators for ". . . those actions necessary to preserve the legislative process but not beyond them." 759 F.2d at 717. The Court defined a "legitimate legislative sphere" as an activity which is (1) an integral part of the deliberative and communicative process by which members participate in committee and House proceedings, and (2) addresses proposed legislation or some other subject within the legislature's constitutional jurisdiction. 759 F. 2d at 717. The Palos Hills Council meeting of November 5, 1987, and the Mayor's order of removal fall squarely within a legitimate legislative sphere requiring the application of absolute immunity to the Mayor and Chief.

The purpose of legislative and judicial immunity is the same; to protect the unbridled functioning of the judicial and legislative processes. *Forrester,* 484 U.S. 219; *Tenney,* 341 U.S. 367. Therefore, judicial immunity cases are instructive in analyzing the extent of legislative immunity. Just as in *Valdez v. City and County of Denver,* 878 F. 2d 1285 (10th Cir. 1989), where a judge was held absolutely immune for removing a disruptive individual from a courtroom so that the court could engage in judicial activities, so too the order of a legislator to remove a disruptive person

from a council meeting to enable the legislature to legislate is a legislative function.

In *Mireles v. Waco,* ___U.S.___, 60 U.S.L.W. 3307, a judge was held absolutely immune for ordering police officers to bring an attorney to his courtroom by force because "A judge's decision to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge." 60 U.S.L.W. at 3308. Removing a disruptive individual from a council meeting is a function normally performed by the presiding officer of the council and thus the instant petitioner, as was Judge Mireles, should be afforded absolute immunity. The Mayor's order to remove the disruptive respondent was an action ". . . necessary to preserve the legislative process . . .", *Schultz,* 759 F.2d at 717, and thus the Mayor is legislatively immune from this lawsuit.

The Seventh Circuit's conclusion that "Unlike the officials in *Schultz* and *Collinson,* Bennett's acts concerned a portion of a meeting having no direct connection to legislation," is incorrect. As Judge Wilkinson stated in *Collinson:*

> "Gott was engaged in a legislative function. For the local official, legislative policy is determined in part through public meetings. Gott was acting in furtherance of his duties as President of the Board of Commissioners of Calvert County and chairman of the meeting when he ruled Collinson out of order.
>
> * * *
>
> ". . . Gott's discretionary act was an integral part of the legislative process. The flow of information through that process could be severely jeopardized if every public meeting carried with it the threat of civil liability, not to mention punitive damages." 895 F.2d at 1008.

For all the reasons set out above, this Court should grant the writ of certiorari. The Seventh Circuit opinion has caused widespread concern and confusion among local legislators, and, therefore, plenary consideration by this Court is essential.

II.

The Seventh Circuit's decision that absolute immunity does not extend to the Chief of Police of a local municipality who, in his capacity as sergeant-at-arms, enforces a facially valid order of the Mayor to remove a disruptive individual from a City Council meeting is in conflict with this Court and other circuits.

Appellant Chief Hurley is also absolutely immune for carrying out the order of the Mayor to remove the respondent.

In *Valdez v. City and County of Denver, supra,* the court ruled that deputy sheriffs who removed the respondent from a courtroom pursuant to the order of the judge were absolutely immune from liability. In *Henry v. Farmer City Bank,* 808 F. 2d 1228, 1237-1240 (7th Cir. 1986) the court held that police officers who act in reliance on a facially valid court order are entitled to quasi-judicial absolute immunity because they are nonjudicial officers whose official duties have an integral relationship with the judicial process.

While *Valdez* and *Henry* deal with absolute judicial immunity and not absolute legislative immunity, the compelling logic of these cases applies with equal force to the case at bar. Enforcement of legislative orders to ensure a quiet and orderly atmosphere in which to conduct legislative business, as well as the safety of persons present at the legislative meeting, are an integral part of the legislative process. Chief Hurley, in enforcing the legislative order of Mayor Bennett to remove the respondent, was acting in a ministerial capacity to enforce a facially valid legislative order and therefore enjoyed absolute quasi-legislative immunity. Just as a non-judge is entitled to absolute judicial immunity under certain circumstances, a non-legislator can be afforded absolute legislative immunity. (See, e.g. *Browning v. Clerk, U.S. House of Representatives,* 789 F. 2d 923, 929 (D.C. Cir. 1986), (Clerk of the U.S. House of Representative was found absolutely immune for the firing of a court reporter); *Green v. DeCamp,* 612 F.2d 368, 371 (8th Cir. 1980), (legislative immunity was afforded to a committee counsel acting in the role of a legislative aide to a legislative committee.)

The Seventh Circuit's opinion serves notice on those who are charged with carrying out the facially valid orders of a legislator that to do so may result in liability. As a result these men and women are captured between a rock and a hard place. If they refuse to enforce the order, they are subject to discipline or termination; if they do execute the order, they may be joined in a lawsuit subjecting their personal assets to risk. This is an untenable circumstance requiring a complete review of the Seventh Circuit opinion by this Court.

Petitioner Hurley is entitled to absolute immunity even if the Court determines Mayor Bennett is not. While the Seventh Circuit did not decide this issue, 948 F.2d at 398, note 2, the question was clearly set out in the petitioners' brief as well as the appellate record. Petitioner Hurley's immunity is not dependant upon whether petitioner Bennett has an absolute immunity for the reason Hurley was executing a facially valid order.

III.

The Court of Appeals for the Seventh Circuit improperly concluded it did not have jurisdiction to review the U.S. District Court's denial of petitioners' motion for partial summary judgment based upon qualified immunity.

Should this Court grant certiorari on either of the first two questions, the Court should also consider Question 3. The Seventh Circuit concluded it did not have jurisdiction to consider the denial of petitioners' motion for partial summary judgment based upon a qualified immunity because the Seventh Circuit could not determine whether Bennett's intent in removing Hansen was to suppress the content of the respondent's speech or to allow the Council meeting to continue in an orderly and safe manner. *Hansen,* 948 F. 2d at 400. The petitioners argued that the respondent never sustained his burden of proof that his removal was due to improper motivation as the law requires. See: e.g. *Pueblo Neighborhood Health Centers, Inc. v. Losavio,* 847 F. 2d 642, 649 (10th Cir. 1988). In *Pueblo* the Court concluded:

> "[W]here the defendant's subjective intent was an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated." See also: *Martin v. D. C. Metropolitan Police Department,* 812 F. 2d 1425, 1434 (D.C. Cir.) *holding vac.,* 817 F. 2d 114, holding reinstated subnom. *Bartlett v. Ex Rel Newman v. Bomen,* 824 F. 2d 1240 (D.C. Cir. 1987).

No relevant disputed factual issue exists and the Court should have found it had jurisdiction to consider the question. Given the posture of this case, this is the only opportunity the petitioners will have to seek review of the Seventh Circuit's ruling regarding lack of jurisdiction. If the petitioners are correct that the Seventh Circuit had jurisdiction to hear the issue, the cause should be remanded to the Seventh Circuit to decide the issue.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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February 21, 1992

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 90-3727

CHARLES HANSEN,

Plaintiff-Appellee,

v.

GERALD R. BENNETT, Individually and as Mayor of Palos Hills, and DANIEL HURLEY, Individually and as then former Police Chief of Palos Hills,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 6936—**Ann Claire Williams**, *Judge*.

ARGUED SEPTEMBER 24, 1991—DECIDED NOVEMBER 27, 1991

Before CUDAHY and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

ESCHBACH, *Senior Circuit Judge*. Charles Hansen has long been a political gadfly of Gerald Bennett, the mayor of Palos Hills, Illinois. On November 5, 1987, the Palos Hills city council held a meeting which was also a celebration of the city's youth, "Youth Turnabout Day." Hansen came to the meeting to discuss possible environmental hazards in the city. At one point, Hansen zealously pursued his differences with Bennett, and Bennett called Hansen

out of order. Later in the meeting, during a portion open to comments from the general public on any topic, another citizen discussed the environmental issue with Bennett. A disturbance ensued, and Hansen again spoke out of order. Bennett ordered Hansen removed from the meeting, and Daniel Hurley, the Palos Hills police chief, executed that order. Hansen sued Bennett and Hurley, alleging that they had violated his rights under the First Amendment to the United States Constitution.[1]

The defendants[2] appeal the district court's denial of their motion for partial summary judgment on the grounds of qualified immunity and absolute legislative immunity. Hansen has moved to dismiss the appeal for lack of jurisdiction. In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the Supreme Court held that "a district court's denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 . . ." (emphasis added). In the case at hand, we cannot decide whether the defendants are entitled to qualified immunity without deciding a disputed question of fact. Consequently, we dismiss the qualified immunity appeal for lack of jurisdiction. We can decide the absolute immunity issue as a matter of law, however. Even under the defendants' view of the particular facts of this case, Bennett is not entitled to absolute immunity because he was not acting in a "legislative capacity." *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988). As a result, we affirm the denial of summary judgment on absolute immunity.

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[1] Hansen brought other claims as well. This appeal concerns only whether the defendants are immune for ejecting Hansen from the meeting, however, and thus relates only to the First Amendment claim.

[2] The district court did not consider whether Hurley might be entitled to immunities even if Bennett is not. Moreover, it is not clear whether appellants are arguing that this is the case. As a result, this question is not presented on appeal. Nor is the question whether the defendants have state-law immunity regarding Hansen's pendent claims.

Discussion

On this appeal of a denial of summary judgment, we evaluate the record *de novo* and determine whether we can decide each immunity question without resolving any disputed questions of fact. *Jackson v. Elrod*, 881 F.2d 441, 443 (7th Cir. 1989). If we find that we cannot, then we lack jurisdiction over the appeal of that question.[3] *See, e.g., Elliott v. Thomas*, 937 F.2d 338, 342-43 (7th Cir. 1991). If we can decide the issue as a question of law posed by undisputed facts, however, then we have jurisdiction. *See, e.g., Hannon v. Turnage*, 892 F.2d 653, 654 (7th Cir.), *cert. denied*, ____ U.S. ____, 111 S. Ct. 69 (1990).

1. Qualified Immunity

Bennett's entitlement to qualified immunity depends on whether a reasonable person in his position, acting on his information and motivated by his purpose, would have known that ejecting Hansen violated his clearly established rights.[4] The district court held that it could not

[3] This rule presents a curious situation. If a district court denies summary judgment because it finds a factual dispute, and the appellate court agrees, then the appellate court is forced to hold that it lacks jurisdiction. As a result, it is impossible for an appellate court to affirm such a ruling. Though curious, this situation makes sense. Dismissing the appeal is equivalent to affirming the denial; either way, the case and the issue proceed to trial. The situation seems curious only because we do not often face it outside the context of immunities, as denials of summary judgment are not ordinarily appealable. *United States for Use of Valders Stone & Marble, Inc. v. C-Way Const. Co.*, 909 F.2d 259, 261 (7th Cir. 1990).

[4] Framing this question involves a conundrum. The conundrum begins with *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which eliminated the subjective component of qualified immunity by holding that "government officials performing discretionary functions generally are shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." After *Harlow*, evidence of a government official's bad motive is

(Footnote continued on following page)

decide this question on summary judgment because of a disputed factual question regarding Bennett's purpose; was he suppressing speech on the basis of its content? We agree with the district court that there are facts on both sides of this question. For example, Bennett admitted in his affidavit that he did not approve of Hansen's brand of political activism. During the meeting, he complained that Hansen was "political" and had brought reporters to other meetings. Another individual who was extremely disruptive was not removed from the meeting. And perhaps most important, Bennett did not silence Hansen until he raised a particular topic. Other facts suggest that Bennett was not singling Hansen out. Hansen's outburst had disrupted and delayed the meeting. The city council had

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[4] *continued*

generally irrelevant to the question of qualified immunity. In some cases, however, the defendant's "mental state is part of the definition of the wrong." *Elliott v. Thomas*, 937 F.2d at 344. In a First Amendment claim like Hansen's, proving that the official violated clearly established First Amendment rights requires the plaintiff to prove that the official *intended* to suppress speech on the basis of its content. If the plaintiff's evidence of motive is irrelevant, then he cannot survive summary judgment. In *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990), Judge Phillips resolved this conundrum. Gott, a governmental official, had ejected Collinson, a disputatious citizen, from a public hearing. The district court denied the official's motion for summary judgment. On appeal, Judge Phillips recognized that the *Harlow* Court could not have intended to bar every claim that required proof of the defendant's mental state. As a result, he imported the intent requirement inherent in a First Amendment claim into *Harlow*'s objective standard: Gott had to show that "a reasonable person in Gott's position, that is, one acting on Gott's information and motivated by Gott's purpose," would have known that ejecting Collinson violated his clearly established rights. *Id.* at 1001. Moreover, Judge Phillips safeguarded the policy animating *Harlow*—allowing officials to benefit from immunity on summary judgment unless the plaintiff can do more than allege bad motive—by requiring Collinson to produce "specific evidence" of intent, not merely unsupported allegations. *Id.* at 1002-4. The Seventh Circuit has, in essence, followed this approach. *See Elliott*, 937 F.2d at 346.

other business on its agenda. And Hansen had spoken on the same topic on other occasions.

Despite these contradictory facts, the defendants argue that their appeal cannot present a factual question because the record includes a tape recording and transcript of the city council meeting. As a result, the parties do not disagree about what Hansen said or did, what Bennett said or did, or what generally transpired at the meeting. Be that as it may, the record does not enable us to determine the factual issue of Bennett's intent; we would need a transcript of his thoughts for that. In so holding, we are mindful that "[s]ummary judgment is not defeated merely because issues of motive or intent are involved." *Jackson v. Elrod*, 881 F.2d at 443. We do not hold that Bennett's intent is metaphysically unknowable, but that there is a genuine factual dispute on the question.

Our recent decision in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), is controlling. One defendant in *Elliott* contended that he was qualifiedly immune because he had not been involved in the events in question. *Id.* at 342. Another set of defendants claimed that the plaintiff's allegations were simply false. *Id.* at 343. After the district court denied both motions for qualified immunity, we dismissed the appeals because none of these defendants contended that they had acted "in the shadow of legal uncertainty." Rather, they raised factual disputes. *Id.* at 342-43. Like the *Elliott* defendants, Bennett and Hurley do not claim that their appeal turns on legal uncertainty. Rather, the issue in this appeal is whether Bennett intended to suppress Hansen's speech or whether he genuinely believed that the disruption justified Hansen's removal. If Bennett was attempting to suppress Hansen's speech on the basis of its content, then he violated clearly established rights and is not entitled to qualified immunity. *Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990). If, on the other hand, he was enforcing an appropriately limited time, place, and manner restriction, then he did not violate clearly established rights, *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th

Cir. 1989), and is immune. We lack jurisdiction over the issue of qualified immunity.

2. Absolute Legislative Immunity

Bennett argues that he is entitled to absolute legislative immunity because he removed a disruptive person from a city council meeting so that the city's aldermen could proceed with the meeting and, ultimately, conduct legislative business. Bennett relies on the facts that he, as mayor, had a legislative power to break any tie in a vote among the aldermen, and that the council conducted legislative business later in the meeting. At the same time, Bennett does not dispute the fact that this portion of the meeting was open to any citizen's comment on any topic. Palos Hills Ordinance 716, Ex. C; Statement of Uncontested Facts at 3-4. As a result, this meeting contained elements of a "town meeting" as well as elements of a legislative session. Taking these undisputed facts, we are presented with a question of law: if a legislator acts to restore order to that portion of a city council meeting which is devoted to open comments from the general public, is that legislator entitled to legislative immunity?

The applicability of absolute immunity to enforcement of rules governing parliamentary procedure is an open question. To the best of our knowledge, no court has held that enforcing such rules is a legislative act.[5] What makes

[5] Similar cases have been decided on other grounds. *See, e.g., Musso v. Hourigan*, 836 F.2d 736, 738 (2nd Cir. 1988) (when Board of Education members ejected citizen who had interrupted meeting, court did not mention legislative immunity); *Wright v. Anthony*, 733 F.2d 575, 577 n.3 (8th Cir. 1984) (when congressman ordered witness in public hearing to conclude testimony, court upheld restriction on the merits, without reaching legislative immunity defense); *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989) (when mayor ejected citizen from public meeting of city commission, court upheld restriction on the merits); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990) (when president of board of county commissioners ejected citizen from public hearing, parties did not argue issue of legislative immunity (although concurring judge decided case on that ground)).

this case even more open is the fact that the Palos Hills city council meeting was not a pure legislative session; at the time Hansen was ejected, the citizenry was engaged in an open debate on non-legislative matters. As a result, we are faced with a difficult choice. If we accept the possibility of absolute immunity in this context, we risk extending absolute immunity to an activity which is not "a part of the legislative process itself." *United States v. Brewster*, 408 U.S. 501, 528 (1972). This, the Supreme Court has never done. *Id.* Or, we can decline to extend absolute immunity to an act undertaken by a legislator within a governmental meeting in which legislative business was conducted. Although this has rarely been done, it is neither unprecedented nor illogical.[6] In making this choice, we bear in mind that "[t]he government official seeking immunity . . . has the burden of showing that an exemption from personal liability is justified. . . ." *Rateree*, 852 F.2d at 950.

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[6] In *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982), *rev'd on other grounds*, 463 U.S. 783 (1983), the plaintiff challenged the Nebraska state legislature's practice of compensating a chaplain to open each legislative session with a prayer. The state defended on the ground, *inter alia*, of legislative immunity. The Eighth Circuit held that enacting and enforcing rules regarding the prayer and payment of the chaplain were not legislative acts for purposes of absolute immunity. The court reasoned that "no speech activity by any legislator is at issue"; "the deliberative process of the legislature will not be impaired" by the claim; and the "prayer practice . . . bears no substantive relation to the process of enacting legislation." *Id.* at 232.

We also note that a "physical assault of one member of Congress upon another" does not appear to be a legislative act. Laurence H. Tribe, *American Constitutional Law* § 5-18 at 371 n.9 (Foundation, 2d ed. 1988). Finally, if we held that legislative immunity covered every act undertaken within a legislative session, whether legislative in function or not, we would violate the Supreme Court's admonition "not to extend the scope of [legislative immunity] protection further than its purposes require." *Forrester v. White*, 108 S.Ct. 538, 542 (1988).

Bennett cannot meet this burden. Neither his legislative powers nor the city council's subsequent legislative actions clothe Bennett with absolute immunity. We look only to the function Bennett was performing when he ejected Hansen. *Forrester v. White*, 108 S.Ct. 538, 542 (1988). We apply this functional approach even when evaluating conduct that takes place within a meeting which includes some legislative business. In *Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988), city employees alleged that three city commissioners had improperly approved a city budget that eliminated the employees' jobs. The employees argued that the commissioners were not entitled to legislative immunity because employment decisions are inherently administrative, notwithstanding the fact that the commissioners had eliminated the jobs by voting on legislation. *Id.* at 950. Chief Judge Bauer's opinion did not hold that the commissioners were immune because they had approved the budget during a legislative session. Rather, we looked at the commissioners' function when they executed the particular act at issue: "[t]o the extent that the commissioners act in their legislative capacity, they are protected; when they act administratively, they are not." *Id.* at 951. Because the challenged action was a vote on legislation, we held that the commissioners had acted in their legislative capacity and were absolutely immune. *Id.* After *Rateree*, Bennett, even if he has legislative powers and was acting within a session which later conducted legislative business, is entitled to legislative immunity only if he was acting in his "legislative capacity." *Id.* at 950. *See also Mireles v. Waco*, ____ S.Ct. ____, 1991 WL 171242, 60 U.S.L.W. 3161 (1991) (applying functional approach to judicial order made within courtroom).

The Supreme Court has construed the legislative capacity narrowly, holding that legislative immunity "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not *a part of the legislative process itself.*" *Brewster*, 408 U.S. at 528 (emphasis added). In so holding, the Court noted that it has accorded legislators absolute immunity only when they were

voting on a resolution,[7] speaking on legislation or in a legislative hearing,[8] or subpoenaing records for use in a legislative hearing.[9] Cases subsequent to *Brewster*, both in the Supreme Court and in this Circuit, have continued to limit legislative immunity to these narrow functions.[10]

Applying these standards, we can decide the present question on summary judgment.[11] The facts indicate that the city council meeting had elements of a "town meeting" as well as elements of a legislative session. The meeting was

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[7] *See Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Powell v. McCormack*, 395 U.S. 486 (1969).

[8] *See United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

[9] *See Dombrowski v. Eastland*, 387 U.S. 82 (1967).

[10] *See, e.g., Gravel v. United States*, 408 U.S. 606, 615-16, 622-27 (1972) (immunity for introducing Pentagon Papers into public record during subcommittee hearing, but not for arranging private publication); *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (immunity for preparing subcommittee report and voting for publication of report); *Hutchinson v. Proxmire*, 443 U.S. 111, 123-133 (1979) (no immunity for issuing defamatory press releases and newsletters); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (immunity for voting on ordinance); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983) (immunity for voting on ordinance); *Rateree v. Rockett*, 852 F.2d 946, 951 (7th Cir. 1988) (immunity for voting on budget).

[11] We note that the district court did not hold that disputed factual issues prevented the issue from being resolved on summary judgment. Rather, the court held that Bennett was not acting as a legislator when he ordered Hansen's removal from the council chambers during the open portion of the meeting. Moreover, the district court noted that the council meeting was not a "legislative session" because the aldermen were not engaged in the process of making laws. We agree with the district court that the portion of the meeting when Hansen was thrown out was not a legislative session.

in its "town meeting" phase when Hansen was ejected.[12] That portion of the meeting was open to participation from the general public. "[A]ny citizen" was allowed to speak on any issue, including issues not on the agenda, as long as he or she was recognized by the chair. Palos Hills Ordinance 716, Ex. C; Statement of Uncontested Facts at 3-4. Indeed, before Hansen was ejected, a presiding officer had announced, "The meeting is now open to the general public." Transcript of Meeting at 16. Moreover, during this portion the citizens were not limited to discussing legislative issues,[13] and the aldermen were not considering any legislation or investigating any legislation. They did not conduct legislative business until another portion of the meeting, after an officer had closed the open portion and announced that the meeting would proceed with the agenda. Tape Recording of Meeting. In sum, this portion of the meeting was not legislative. In addition, Bennett's action was not legislative. He was not voting, speaking on legislation, or investigating a legislative issue. On these narrow facts, we cannot say that restoring order to the meeting was "a part of the legislative process itself." Ben-

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[12] A city meeting which includes legislative business is not necessarily a legislative session for all purposes and at all moments. The Eleventh Circuit has recognized that a portion of a "city commission meeting" may constitute a "public forum" for First Amendment purposes "when the commission intentionally opened it to the public and permitted public discourse on agenda items." *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989); *see also City of Madison, Joint School District No. 8 v. Wis. Emp. Rel. Com'n*, 429 U.S. 167, 174-76 (1976) (holding state restriction on speech during school board meetings unconstitutional because "the State opened a forum for direct citizen involvement" by holding a meeting which was "open to the public").

[13] The environmental matter which Hansen wished to discuss was not legislative. Hansen wanted the mayor to disclose information on whether a particular site was dangerous. To that end, he requested that the mayor read publicly a letter from the "Federal Super-Fund Program." Trans. at 11. Communication by a legislator to his or her constituents is not legislative activity for purposes of legislative immunity. *Hutchinson v. Proxmire*, 443 U.S. at 130-33.

nett's act was at most "incidentally related" to legislative business. *Brewster*, 408 U.S. at 528. Consequently, we hold that when Bennett regulated an open public discussion of various issues, he was not acting in a legislative capacity.

We emphasize the narrow holding of this case. This would be a different case if the city council meeting had been a purely legislative session. If, for example, Hansen had disrupted the city council (or a subcommittee thereof) while its members were voting on legislation, debating legislation among themselves, or holding a legislative hearing or investigation, Bennett might well be entitled to absolute immunity for ejecting him. In the recent case of *Mireles v. Waco*, a state judge argued that he was absolutely immune for ordering police officers to seize a public defender whose absence was delaying the initial call of the judge's calendar. In a 5-3 *per curiam* decision, the Supreme Court held that the judge's order was taken in his judicial capacity because the defender "was called into the courtroom for purposes of a pending case. . . ." 1991 WL 171242 at 2. *Mireles* thus amounts to a holding that an act which preserves the judicial process may be judicial. *See also Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1989) (granting judicial immunity to law enforcement officials who executed judge's order to eject unruly spectator from courtroom). Bennett would have us extend the logic of *Mireles* and *Valdez* from judicial immunity to legislative immunity and hold that an act which preserves the legislative process is legislative. For this proposition, Bennett relies on *Schultz v. Sundberg*, 759 F.2d 714 (9th Cir. 1985), and *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990). In *Schultz*, Alaska state legislators were boycotting the legislature. The boycott prevented the legislature from forming a quorum, which was necessary for the legislature to approve the governor's new appointees. The "presiding officer of the joint session" ordered law enforcement officials to compel some legislators to attend, and, in turn, one of those legislators sued the presiding officer. The Ninth Circuit held that the presiding officer was legisla-

tively immune for compelling fellow legislators to attend a legislative session. The defendant's acts were legislative because they involved "an effort to convene a joint session. The business before the Legislature . . . was clearly legislative in nature." *Id.* at 717 (quoting 577 F. Supp. 1491, 1495 (D. Alaska 1984)). In *Collinson*, a local official had ejected a citizen from a "public hearing." Judge Wilkinson's concurrence argued that a local official should be absolutely immune for enforcing rules of parliamentary procedure during a public hearing.[14] 895 F.2d at 1005. The official's acts were legislative because he was trying to preserve order in a public hearing which concerned "specific plans" under consideration by the local Board of Commissioners. *Id.* at 995. Judge Wilkinson's concurrence and *Schultz* arguably stand for the proposition that an act which preserves the legislative process is legislative. Even if we so held, however, we could not say that Bennett's act preserved the legislative process. Unlike the officials in *Schultz* and *Collinson*, Bennett's acts concerned a portion of a meeting having no direct connection to legislation.

Because the Palos Hills city council meeting included a mixture of legislative, executive, and administrative functions, as well as open discussions akin to a public forum, we have had to draw some fine lines in this case. But that is the nature of the absolute immunity beast. "Although this line drawing is often difficult, it preserves the balance between inhibiting public officials from exercising their essential duties and protecting victims of wrongs committed by public officials." *Rateree*, 852 F.2d at 951.

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[14] *Cf. Wright v. Anthony*, 733 F.2d 575, 577 n.3 (8th Cir. 1984) (when congressman ordered witness in public hearing to conclude testimony, court upheld restriction on the merits, without reaching legislative immunity defense); *Musso v. Hourigan*, 836 F.2d 736, 738 (2nd Cir. 1988) (no consideration of legislative immunity when Board of Education members ejected citizen who had interrupted meeting, even though meeting "had progressed beyond the point during which the Board was obliged, by virtue of its bylaws, to entertain questions and comments from the public").

In *Rateree*, the employees argued that because the individual commissioners had executive as well as legislative powers, they could never benefit from legislative immunity. 852 F.2d at 951. Chief Judge Bauer's opinion rejected this argument, refusing to promulgate "a broad, per se rule which eliminates all immunity for the commission form of government." *Id.* In the present case, Bennett also mixes executive and legislative functions. If we were to grant Bennett absolute immunity for an act which had only an incidental connection to legislation, then we would effectively cloak everything undertaken by mayors in city council meetings with absolute immunity. Just as we declined to promulgate a per se rule eliminating all legislative immunity for the commission form of government in *Rateree*, we decline to promulgate a per se rule granting blanket legislative immunity for the mayoral form of government adopted by Palos Hills. Statement of Uncontested Facts at 11. Recognizing that Palos Hills city council meetings consist of discrete portions will not prevent Bennett from benefiting from legislative immunity under the appropriate circumstances. Rather, we are simply confining legislative immunity to those portions of the meetings which are in fact legislative. Palos Hills remains free to conduct legislative business during those portions, *City of Madison*, 429 U.S. at 175 n.8, and, accordingly, Bennett may be entitled to legislative immunity for his actions during them.

This holding is consistent with the purposes of legislative immunity. The Supreme Court has admonished that when deciding claims of absolute immunity, we must concentrate on an official's function so as "not to extend the scope of the protection further than its purposes require." *Forrester*, 108 S.Ct. at 542. The purpose of legislative immunity is to "protect the integrity of the legislative process by insuring the independence of individual legislators." *Brewster*, 408 U.S. at 507. In this case, we cannot see how Bennett's independence as a legislator—his ability to vote and speak freely on legislative matters—is implicated. What is implicated is Bennett's discretion

to govern public speech. This exercise of discretion is better protected by qualified immunity.[15]

Conclusion

We cannot decide whether the defendants are entitled to qualified immunity without deciding the disputed factual issue of Bennett's intent. As a result, that portion of this appeal relating to the qualified immunity question is DISMISSED for want of jurisdiction. In addition, we agree with the district court that Bennett was not acting in a legislative capacity when he ejected a citizen from that portion of a city council meeting which was devoted to public comment on numerous issues. Consequently, the district court's denial of summary judgment on absolute immunity is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[15] *Collinson v. Gott*, 895 F.2d at 997 n.1 (when parties did not argue issue of absolute immunity, Judge Phillips accepted "the parties' assumption" that "while presiding over a public meeting an official . . . is exercising discretionary powers in an executive function," and therefore, "may be entitled . . . to qualified immunity"); *Harlow v. Fitzgerald*, 457 U.S. at 807.

**UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

Name of Assigned
Judge or Magistrate WILLIAMS

Case Number: 88 C 6936

Date: OCTOBER 22, 1990

Case Title: HANSEN V. BENNETT

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(2) [X] [Other docket entry:]

Pursuant to memorandum opinion and order, defendants' motion for partial summary judgment is granted as to plaintiff's conspiracy claim, and denied on plaintiff's claim for damages as a result of his removal from council chambers.

[X] Status hearing

[7] set for 01 NOV 90 at 9:30 a.m.

(12) [X] (For further detail see

[X] Order attached to the original minute order form.)

[X] Docketing to mail notices. Document # 160

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Charles Hansen,
Plaintiff,

v. Case No. 88 C 6936

Gerald R. Bennett, et al.
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Charles Hansen brought this action for violation of the first, fourth, and fourteenth amendment of the United States Constitution, pursuant to 42 U.S.C. §§ 1983 and 1988. Pursuant to Fed R. Civ. P. 56(b), defendants, Mayor Gerald Bennettt and Police Chief Daniel Hurley bring this motion for summary judgment on those portions of Hansen's complaint which seek damages for his removal from the council chambers, and plaintiff's allegation that the Mayor and Police Chief conspired to violate plaintiff's rights. Defendant's motion for summary judgment is granted in part, and denied in part.

Background

The Palos Hills City Council regularly holds city council meetings, which the public is invited to attend. Citizens may address the council by filing a "Citizen's Petition" with the council clerk. Petitioners are allowed a minimum of two minutes to state their concerns. Citizens also have a chance to speak during "Citizen Hearings", at which point anyone can address the council provided he or she is recognized by the chair.

Plaintiff, Charles Hansen, attended the November 5th City Council meeting. Hansen, a Palos Hills homeowner, was concerned about environmental matters and hazardous waste allegedly dumped at Stony Creek Park West. He had, in fact, spoken before the council about Stony Creek on a number of occasions in the past. The record suggests that Gerald Bennett,

the Mayor of Palos Hills, objected to Hansen's means of bringing the issue before the public and the council.[1]

Before the meeting, Hansen properly filed a petition with the council clerk, indicating his intention to speak about the issue of Stony Creek at the November 5th meeting. Hansen encouraged a number of other concerned citizens to attend the meeting as well. On November 5th, 1987, the council chambers were filled to capacity.

When Hansen's petition came before the council, the Mayor informed him that he had three minutes to speak. Hansen began speaking on the Stony Creek issue, but was told by the Mayor that his time was up when he intimated that he would read a letter that was sent to him by the State Super Fund Program, which he had already forwarded to the city council. A number of people in the audience objected to Hansen's being cut off before he could reveal the contents of the letter.

During the Citizen's Hearings portion of the meeting, several citizens again brought up the issue of Stony Creek. Many people spoke out of order during the meeting, including Hansen. When Hansen spoke out of order for the third time the Mayor asked the Chief of Police, Daniel Hurley, to eject him from the meeting. Plaintiff claims that after he was ejected from the meeting he was beaten by Hurley and a number of other unidentified policemen.

Hansen now charges Bennett and Hurley, the city of Palos, and other unknown defendants, with several violations of his constitutional and statutory rights. Defendant asks for summary judgment on those counts which allege that Hansen's rights were violated as a result of his removal from the council chambers, and that the Mayor "directed, condoned, knew of, and approved of" the Chief and others' use of excessive force against the plaintiff. This court grants defendant's motion for summary judgment with respect to the conspiracy count, but denies the motion based on defendants' arguments for immunity.

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[1] Bennett's affidavit, p. 256.

Absolute and Qualified Immunity

Defendants argue that the Mayor's order to remove Hansen from the city council meeting should be protected by absolute immunity, which shields legislators from liability when they are acting in a legislative capacity. Legislators are absolutely immune from suits which stem from legislative actions, such as enacting laws and resolutions.[2]

Of course, Hansen's suit does not concern defendant's actions as a legislator. While the Mayor was a member of a legislative body, he was not acting as legislator when Hansen was removed from the council chambers. Hence, defendants' arguments for absolute immunity must fail. The court is thoroughly unpersuaded by defendant's notion that holding a city council meeting amounts to, or had anything to do with a legislative session, or act.[3] The result and the analysis are the same for defendant's claim of immunity under Illinois law, which also provides legislators with immunity for *legislative* acts.

The defendants' argument for qualified immunity has more bite, but must ultimately be rejected by the court as well. The Seventh Circuit Court of Appeals has explained that

> Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. (*Doe v. Bobbit,* 881 F.2d 510, 511 (7th Cir. 1989) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 2738 (1982).

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[2] *See e.g., Lake County Estates, Inc., v. Tahoe Reg. Planning Agency,* 440 U.S. 391, 99 S.Ct. 1171 (1979), and *Latinos Political Action Committee v. City of Boston,* 581 F. Supp. 478 (D. Mass. 1984). The court notes that defendant's references to cases involving those guaranteed immunity because they are involved in the judicial process are not remotely relevant to this discussion.

[3] Defendants unconvincingly cite *Schultz v. Sundberg,* 759 F.2d 714 (9th Cir. 1985), to support its argument that a meeting of the legislature can amount to a legislative session. The defendants totally ignore the fact that in *Schultz,* the legislature was meeting for the purpose of engaging in the legislative process, i.e. law making. Here the facts clearly show that the Palos Hills city council meeting was not a legislative session.

The law further requires that "the contours of the right be sufficiently clear [so] that a reasonable official would understand that what he is doing violates the law." *Doe,* 881 F.2d at 511 (citing *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987)). The issue in the instant case is whether, in 1987, the defendants violated a clearly established statutory or constitutional right by having Hansen removed from the city council chambers.

This is where the real trouble for defendant's motion for summary judgment begins. While the defendants indicate that their motion concerns all plaintiff's claims for damages stemming from his removal from council chambers [4] (except for the excessive use of force count), in making the argument for qualified immunity the defendant's brief touches on only the freedom of speech claim. The defendants' motion does not even mention, let alone address the substance of the majority of plaintiff's claims. Given the evidence that was presented before the court, this court will only focus on the speech claim in denying defendant's arguments for qualified immunity.[5]

The court now considers the argument that defendants should not be liable for restricting Hansen's speech on the grounds of qualified immunity. The defendants' claim for qualified immunity is governed by first amendment law. To begin with, the first amendment clearly prohibits state action that regulates speech on the basis of content. *Police Dep't v. Mosley,* 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-90 (1972). Plaintiff's forced removal from the council meeting certainly represented state action for first amendment purposes.

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[4] See defendants' motion for summary judgment, p. 1. Plaintiff's complaint includes claims unlawful arrest, unlawful deprivation of free speech, deprivation of the right to peaceably assemble, deprivation of the right to petition, deprivation of rights guaranteed by the Illinois constitution, willful and wanton misconduct, battery, assault, false imprisonment, intentional infliction of emotional distress and negligence.

[5] If, and only if, the defenants determine that no genuine issue of material fact exists as to the other counts, they should file another motion for summary judgment by November 5, 1990, providing substantive legal arguments on each count to support their argument.

Courts have found that while the government can legitimately subject speech to time, place, and manner restrictions, these restrictions are circumscribed when the speech occurs in an area where public speech is usually allowed, like a public city council meeting. *Cf. Board of Airline Commissioners v. Jews for Jesus, Inc.*, 482 U.S.569, 107 S.Ct. 2568, 2671 (1987). In order to survive constitutional attack, in a public forum restrictions against speech must be "content-neutral, serve a significant governmental interest, and leave open ample alternative channels for communication of the information." *International Caucus of Labor Committees v. City of Chicago,* 816 F.2d 337, 339 (7th Cir. 1987), citing *Heffron v. International Society of Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48, 101 S.Ct. 2559, 2563-64 (1981).

The defendants argue Hansen's removal from the council chambers represented a valid restriction on speech, and therefore did not violate Hansen's constitutional rights. They assert that Hansen was removed from the city council meeting because he was interfering with the legislative process by disrupting the meeting. They further suggest that the crowd at the city council meeting was made unruly by Hansen's interruptions and aggressive behavior. The court cannot accept the defendants' arguments on summary judgment. A material question of fact exists concerning whether Hansen was silenced and removed from the city council meeting because of the content of his speech, which would be a clear violation of established law.

First, the court notes that Hansen was not silenced until he brought up "the letter", a topic that the Mayor appeared to have little interest in discussing. The court further questions the defendants' motives for removing Hansen because other individuals were allowed to voice their opinions without opposition, and others who spoke out of order during the meeting were not removed from chambers. Finally, in his deposition, the Mayor acknowledged that he did not approve of Hansen's brand of activism. This court concludes that a rational jury could infer that the Mayor had Hansen removed from the meeting because he disagreed with the content of what Hansen had to say. At the same time, a rational jury might also determine that Hansen's silencing and removal did not amount to a violation of Hansen's

first amendment rights. Thus, because a genuine issue of material fact exists concerning whether the Mayor's suppression of Hansen's speech violated Hansen's clearly established first amendment rights, the defendants' motion for summary judgment on grounds of qualified immunity is denied.

Conspiracy

Finally, the court considers defendant's motion for summary judgment on the conspiracy theory raised in various counts of the complaint. Specifically, Hansen alleges that Mayor Bennett directed, condoned, knew of and approved of the use of excessive force against him, his unlawful arrest, and other unlawful actions committed by various defendants against him. The parties agree that Mayor Bennett was not present at the alleged beating and jailing of the plaintiff; the parties further agree that plaintiff's vague accusations against the Mayor amount to a charge that Bennett conspired with Chief Hurley to harm Hansen. Defendant asks for summary judgment on this issue.

Based on the evidence presented, there is no question of material fact regarding the existence of a conspiracy between the defendants to harm the plaintiff. A charge of conspiracy requires some evidence of "a meeting of the minds" between the charged parties to commit some criminal act. In the instant case, the plaintiff does not even attempt to produce evidence of an agreement between Hurley and Bennett to harm him. Plaintiff's evidence to support his conspiracy theory proves nothing. Hansen merely alleges that both the Mayor and the Police Chief disliked him, and that Hurley heard the Mayor make threats toward Hansen. Plaintiff finally claims in his deposition testimony that the Mayor's angry face (when Hansen was led out of the council chambers) indicated to him that the Mayor would approve of his being harmed by the police department. This evidence does not even remotely amount to proof of a conspiracy. Further, Hurley and Bennett directly state in their affidavits that no conspiracy existed between them to harm Hansen. Given the evidence presented, the court finds that there is no material question of fact regarding the existence of a conspiracy. Defendants motion for summary judgment on this issue is granted.

Conclusion

For the foregoing reasons, defendants' motion for partial summary judgment is granted as to plaintiff's conspiracy claim, and denied on plaintiff's claim for damages as a result of his removal from council chambers.

E N T E R:

/s/ ANN CLAIRE WILLIAMS
Ann Claire Williams, Judge
United States District Court

Dated: Oct 22 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Charles Hansen,
Plaintiff,

v. Case No. 88 C 6936

Gerald R. Bennett, et al.
Defendants.

MEMORANDUM OPINION AND ORDER

Defendants Gerald R. Bennett, et. al., brought this motion asking the court to reconsider its October 22, 1990, ruling denying defendants' motion for partial summary judgement with respect to plaintiff's free speech claim. The court did not consider the motion for summary judgement in the context of plaintiff's other claims because the defendants did not specify what other claims for damages their motion challenged.

In the motion to reconsider defendants raise no new arguments; however the motion to reconsider is granted, for purpose of clarifying the court's original ruling. For the reasons explained below, defendants' partial motion for summary judgment with respect to Counts II, IV, V, VI, and VII through XII (to the extent those Counts concern a first amendment claim under Illinois law) is denied.[1]

Motion for Summary Judgement

In their motion to reconsider, the defendant's once again assert their belief that Mr. Hansen's removal from the chambers was protected by absolute immunity. For the reasons explained in its October 22, 1990, ruling the court rejects the defendant's arguments for absolute immunity, and specifically rejects this argument with respect to all of the Counts mentioned above.

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[1] Since the court's October 22, 1990, thoroughly discussed the facts and the legal principles which govern this case, and there are no new arguments to consider, the court will be brief in deciding this motion.

The court now considers the defendant's arguments for qualified immunity. Plaintiff claims that his forced removal from the council meeting violated his right to freedom of speech, peaceable assembly and his right to petition the government. The defendants claim that their actions are protected by qualified immunity. As was explained in the October 22, 1990, order:

> [u]nder the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Doe v. Bobbit,* 881 F.2d 510, 511 (7th Cir 1988).

The law further requires that "the contours of the right be sufficiently clear [so] that a reasonable official would understand that what he is doing violates the law." *Doe,* 881 F.2d at 511. In the instant case, the question is whether the defendants violated clearly established constitutional rights by having the plaintiff removed from council chambers.

Plaintiff contends that his first amendment rights to peaceably assemble, petition the government, and to speak freely, were violated by his forced removal from the chambers. The court has already ruled on the legitimacy of the claim of qualified immunity in the context of free speech. In determining whether defendants' claim of qualified immunity for the alleged violations of plaintiff's other first amendment rights is valid, the analysis is the same as that for the speech claim.[2] Like speech, the right to petition the government and to peaceably assemble, can be subjected to legitimate time, place and manner restrictions. However, in order to survive a constitutional attack, in a public forum restrictions against speech must be "content-neutral, serve a significant governmental interest, and leave open ample alternative channels for communication of the information." *International Caucus of Labor Committees v. City of Chicago,*

[2] Right to petition and right to free speech are separate guarantees, but the rights were cut from the same cloth as the other guarantees of the First Amendment, and are generally subject to the same constitutional analysis. *Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524 (1985). Right of peaceable assembly is subject to the traditional time, place and manner restrictions. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 578, 100 S.Ct. 2814 (1979).

816 F.2d 337, 339 (7th Cir. 1987), citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48, 101 S.Ct. 2559, 2563-64 (1981).

For the reasons explained in the October 22, 1990, order the court finds that a material question of fact exists concerning whether the defendants removed the plaintiff from the council chambers (thereby restricting his right to speak, assemble and petition the government) because of the content of his speech, which would be a clear violation of established law. Defendants' motion for partial summary judgement on the basis of qualified immunity is denied.

Conclusion

For the foregoing reasons, defendant's motion for partial summary judgement with respect to Counts II, IV, V, VI, and VII through XII (to the extent those Counts concern a first amendment claim under Illinos law) is denied.

E N T E R:

/s/ ANN CLAIRE WILLIAMS

Ann Claire Williams, Judge
United States District Court

Dated: Nov 21 1990